Petition

NO. 81-1508

Office - Supreme Court, U.S.
FILED
JAN 27 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANDREW MARTIN MARINE CORPORATION
and ANDREW MARTIN INTERNATIONAL
Petitioners,

versus

MOTOREN-WERKE MANNHEIM, AG and
OOSTERHUIS INDUSTRIES, INC.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether an order staying an admiralty action under the Federal Arbitration Act, 9 USC §3 is appealable under 28 USC §1292 (a) (1).

B. Whether an order staying an admiralty action under the Federal Arbitration Act, 9 USC §3 is appealable under 28 USC §1292(b).

C. Whether an order staying an admiralty action under the Federal Arbitration Act, 9 USC §3 is appealable under 28 USC §1651.

LIST OF ALL PARTIES

Pursuant to Rule 28.1, all parties to this proceeding, including parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation are: Andrew Martin Marine Corporation, Andrew Marine Sea Services, In., Andrew Martin Industries, Inc., Tiger Services, Inc., Andrew Martin International N.V., Mission Drilling & Exploration Company, Rhonda Martin, Inc., Andrew M. Seafood, Inc., 3–M Marine Service, Inc., 3–M Partnership, Offshore Transportation, Inc., Andrew Martin Ice Company

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ANDREW MARTIN MARINE CORPORATION
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Petitioners,

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MOTOREN-WERKE MANNHEIM, AG and
OOSTERHUIS INDUSTRIES, INC.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The order of the Fifth Circuit, without opinion, dismissing petitioners' appeal to the Fifth Circuit was entered on November 30, 1981 and is attached hereto at Appendix A, p. A-1; the decision of the United States District Court for the Eastern District of Louisiana, rendered on June 6, 1979, appears at Appendix B, p. A-2. The decision of the United States District Court for the Eastern District of Louisiana denying plaintiffs' motion to reconsider the District Court's order staying plaintiffs' action pending arbitration was rendered on October 4, 1979 and is attached hereto at Appendix C, p. A-6.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 30, 1981. The jurisdiction of this Honorable Court is invoked pursuant to 28 USC §1254(1).

STATUTORY PROVISIONS

9 USC §3 - Stay of proceedings where issue therein referrable to arbitration.

> "§3 If any suit or proceeding be brought in any of the courts of the United States upon any issue referrable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referrable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

28 USC §1292(a) (1) - Interlocutory decisions.

> "(a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and a District Court of the Virgin Islands, or of the judges thereof, granting, continuing,

modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

28 USC §1292(b).

"(b) When a district judge, in making in a civil action an order not otherwise appealable under the section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: ***provided, however,*** That application for an appeal hereunder shall not stay proceedings in a district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

28 USC §1651 - Writs.

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

STATEMENT OF THE CASE

Petitioners, Andrew Martin Marine Corporation and Andrew Martin International, brought an action in strict product liability in tort and in admiralty against respondents, Motoren-Werke Mannheim, AG and Oosterhuis Industries, Inc., for the defective design, manufacture and construction of marine diesel engines owned and/or operated by petitioners. Respondents in turn filed a motion to stay petitioners' product liability admiralty action pending arbitration pursuant to the Federal Arbitration Act, 9 USC §3. The basis of respondents' motion to stay petitioners' action pending arbitration is a purported arbitration clause contained in the general sales and delivery contract entered into between Andrew Martin Industries, Inc. and petitioners. Respondents' purported arbitration clause allegedly contained in the general sales and delivery conditions reads in pertinent part:

> "The purchaser concedes the supplier the right to sue before the court competent for the purchaser. Furthermore, the purchaser grants the supplier the right to bring any litigation arising out of or in connection with the contract into a Court of Arbitration . . . The place of arbitration and the law to be applied to the proceeding shall be determined by the supplier."

Petitioners argued before the District Court that respondents' arbitration clause expressly limited its application to causes of action in contract and thus did not affect petitioners' product liability tort action. In fact, respondents' arbitration clause, in order to apply to petitioners' product liability tort action, must expressly refer to tort actions in light of the decision of the Fifth Circuit in ***Jig the Third Corporation vs. Puritan Maritime Insurance Underwriters Corporation***, 519 F.2d 171 (5th Cir. 1975). The United States District Court for the Eastern District of Louisiana entered an order dated

June 6, 1979 staying petitioners' cause of action. The United States District Court declared that the Fifth Circuit's decision in ***Jig the Third Corporation, supra,*** which held that a waiver of a right to sue in tort must be expressly stated in any contract in order to be effective, was distinguishable from the instant case. The District Court said that the issue at hand did not involve the waiver of a right to sue in tort, but merely an agreement that any claims arising out of the contract would be settled by arbitration. The District Court further decided that federal policy, as annunciated in ***Scherk vs. Alberto-Culver Company,*** 417 US 506, 94 S. Ct. 2449 (1974), supported enforcement of the arbitration clause at issue, even though the arbitration clause quoted above did not specify a forum or a law to be applied in the arbitration proceeding and expressly allowed respondents to unilaterally select the forum at their whim.

On June 15, 1979, petitioners moved the court to reconsider its order staying petitioners' strict product liability in admiralty. The court denied petitioners' motion to reconsider its order on October 4, 1979.

On October 3, 1979, petitioners filed their notice of intent to appeal the court's decision to stay their strict product liability action in admiralty with the United States Appellate Court for the Fifth Circuit by virtue of either 28 USC §1292 (a) (1), 28 USC §1292 (b) or 28 USC §1651. Respondents filed a motion to dismiss petitioners' appeal to the United States Appellate Court for the Fifth Circuit on the grounds that this Court's decision in ***Schoenamsgruber vs. Hamburg American Line,*** 294 US 454, 55 S. Ct. 475 (1935), prevented appeal of interlocutory admiralty actions as such decisions are not "at law" and thus not appealable under 28 USC §1292 (a) (1), §1292 (b) or §1651. The United States Court of Appeals for the Fifth Circuit, without opinion, granted respondents' motion to dismiss petitioners' appeal on November 30, 1981. Petitioners appeal from that ruling.

REASONS FOR GRANTING THE WRIT

The United States Appellate Court for the Fifth Circuit in an order dated November 30, 1981 dismissed petitioners' appeal of the District Court's decision staying petitioners' product liability action in admiralty pending arbitration. Dismissal of petitioners' appeal by the United States Appellate Court for the Fifth Circuit was without opinion and thus petitioners must presume that the ground for such dismissal was this Court's decision in ***Schoenamsgruber vs. Hamburg American Line, supra.*** The Supreme Court in ***Schoenamsgruber*** noted that courts had historically divided the remedies available "at law" from those available to an admiralty court. Admiralty courts, for instance, could not exercise equitable powers as could courts at law. Therefore, interlocutory decisions entered by a court sitting in admiralty, such as the order of the District Court staying petitioners' action pending arbitration, were not "final" orders and not appealable. ***See,*** for instance, ***W. R. Grace & Co. vs. The Trawler Crustamar,*** 571 F.2d 379 (5th Cir. 1978). Petitioners respectfully submit that the logic underlying the decision in ***Schoenamsgruber*** is no longer valid and request that this Court find that interlocutory decisions entered in admiralty cases be granted the same rights of appeal as those at law.

Schoenamsgruber held that:

> "While courts of admiralty have capacity to apply equitable principals in order the better to attain justice, they do not have general equitable jurisdiction and, except in limitation liability proceedings, they do not issue injunctions." ***Id.*** at 294. US 457-58, 55 S. Ct. 477.

The Supreme Court concluded in ***Schoenamsgruber*** that although the District Court could issue an order enjoining an action pending arbitration, such injunction was not in fact

an injunction since the District Court was sitting in admiralty.

The shaky foundation upon which the Supreme Court's decision in ***Schoenamsgruber*** has rested has, over the years, been criticized even by those courts which felt constrained to dismiss appeals of orders staying admiralty actions pending arbitration on the ground that such orders are not "final orders." The Second Circuit in ***Carcich vs. Rederi A/B Nordie***, 389 F.2d 692, 695 (2nd Cir. 1968), reluctantly denied an appeal of an order staying an admiralty action pending arbitration describing the rationale for such denial as being based on "out-moded historical distinctions." ***See also Tradex Limited vs. M/V HOLENDRECHT***, 550 F.2d 337, 341 (2nd Cir. 1977); ***Drys Shipping Corp. vs. Freights, Sub-Freights, Charter Hire***, 558 F.2d 1050, 1052 ("antiquated distinctions"). The Fifth Circuit agreed with the Second Circuit's opinion of the rationale underlying the ***Schoenamsgruber*** decision denying the appealability of interlocutory orders in admiralty proceedings:

> "For reasons more historical than logical an order denying a stay pending arbitration in a proceeding in admiralty is not an appealable order." ***W. R. Grace & Co. vs. The Trawler Crustamar***, 571 F.2d 318, 319 (5th Cir. 1978).

The Fourth Circuit in ***J. M. Huber & Co. vs. M/V PLYM***, 468 F.2d 166, 167 (4th Cir. 1972), concurs with the Second and Fifth Circuits' low estimation of the logical underpinnings of ***Schoenamsgruber***:

> "Were the decisional slate clean, we would have no hesitancy in disgarding this fictional distinction in upholding appealability."

Rarely has any decision of this Honorable Court been more roundly criticized and upheld with so little enthusiasm as that in ***Schoenamsgruber***.

Schoenamsgruber has further been undermined by subsequent decisions of this Court, as well as legislative action. For example, in ***Swift & Co. Packers vs. Compania Columbiana Del Caribe, S. A.***, 339 US 684, 70 S. Ct. 861 (1950), the Supreme Court held that an admiralty court deciding a claim against a shipper had fraudulently conveyed a ship to a dummy corporation to avoid seizure of the vessel by the court. The court said that to deny the admiralty court jurisdiction over such a subsidiary equitable question would strangely "hobble" the admiralty system. Justice Frankfurter, writing for the court, stated:

> "We find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction. Certainly there is no ground for believing that this restriction was accepted as a matter of course by the framers of the Constitution so that such sterilization of admiralty jurisdiction can be said to have been presupposed by Article III of the Constitution."

In 1962, the Supreme Court again recognized the power of admiralty courts to grant equitable relief in ***Vaughan vs. Atkinson***, 369 US 527, 530, 82 S. Ct. 997 (1962). In that case, the Court decided that a district court, sitting in admiralty, had authority to grant the equitable relief of an award of attorneys fees and said: "Equity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief."

Perhaps more importantly, in 1966, Congress extended the Federal Rules of Civil Procedure to admiralty cases. The express intent of Congress was to "unify" admiralty, equity and law. Commentators on this unification have quite correctly expressed the opinion that, as a matter of law, this unification

has made equitable remedies freely available in admiralty. Colby, Admiralty Unification, 54 Georgetown L. J. 1258, 1268-69 (1966).

Schoenamsgruber's legal and logical underpendings, if any, have been further attacked by the growing awareness of the circuit courts that, even though sitting in admiralty, injunctive relief is often necessary and may be granted by such courts sitting in admiralty. For instance, the Fifth Circuit in *Lewis vs. S/S BAUNE*, 534 F. 2d 1115 (5th Cir. 1976), declared:

> "The Chancellor is no longer fixed to the woolsack. He may stride the quarterdeck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his landlocked brother, that which equity and good conscience impels." 1976 AMC at 1282, 534 F.2d at 1121, *quoting Compania Anonima Venezolana De Navegacion vs. A. J. Perez Export Co.*, 1962 AMC 1710, 1720, 303 F.2d 692, 699 (5th Cir.), *cert. denied*, 371 US 942, 1963 AMC 281 (1962). *Accord, McKie Lighter Co. vs. City of Boston*, 1972 AMC 752, 335 F. Supp. 663, 666-67 (D. Mass. 1971); *see Guillot vs. Cenac Towing Co.*, 1966 AMC 2685, 366 F.2d 898, 904 (5th Cir. 1966).

The Fifth Circuit summarized the legal evolution in which admiralty courts have recognized their own ability to exercise equitable injunctive powers:

> "Whatever may have been the extent of the equitable power of an admiralty court to issue injunctions prior to the 1966 unification of admiralty and other civil actions, *there should be little doubt today that courts of admiralty, in proper cases, may invoke the equitable tool of*

> *injunction, see McKie Lighter Company vs. City of Boston, supra;* Rule 1, F. R. Civ. P; 14 Wright & Miller, Fed. Practice & Procedure §3671 at 273 (1976); Colby, *Admiralty Unification*, 54 Geo. L. J. 1258, 1268 (1966).
>
> . . .
>
> We see no reason why the injunctive powers contained in Rule 65, F. R. Civ. P., should be prohibited to the district court sitting in admiralty." (Emphasis added).

Likewise, the First Circuit Court of Appeals has recognized the unification of admiralty and law and has expressly found that it is unlikely that the Supreme Court would today adhere to the traditional rule. ***Pino vs. Protection Maritime Insurance Company***, 599 F.2d 10 (1st Cir. 1979). The Court specifically said that there are "no constitutional, statutory or policy reasons of substance" for limiting the admiralty courts equity powers and specifically held that a court, sitting in admiralty, has the authority to issue an injunction.

It must, therefore, be recognized that admiralty courts do now, in fact, possess jurisdiction and power to award equitable remedies including the power to issue injunctions. That authority comes from evolving Supreme Court thinking and specific Congressional intent. Given that conclusion, the strained logic of ***Schoenamsgruber***, and its resultant inconsistent effects on cases "at law" and "in admiralty," is no longer binding. This Court is thus free to recognize the lower court's order for what it is, an injunction prohibiting plaintiff from proceeding with the litigation in this matter, which is clearly appealable under Section 1292 (a) (1) of Title 28 of the United States Code.

The logic supporting the allowance of an appeal of the order

in question is made abundantly clear if one assumes that the litigation in question had been instituted "at law" with the assertion of diversity jurisdiction. The same arbitration provision would have been presented to the District Court, and, had the Court granted the injunction as in the instant case, there would be no question whatsoever regarding the appealability of that decision. There remain no valid policy reasons for denying the admiralty courts the power to grant equitable remedies and no reason to maintain the inconsistent and illogical distinctions between stays granted "at law" and stays granted "in admiralty." As noted by two of the premiere commentators on the law of admiralty, Gilmore and Black, the distinction is "irrational and crippling." G. Gilmore and C. Black, Law of Admiralty, 40-43 (2nd Ed. 1975). The policies of uniformity and judicial economy, as well as the dictates of justice clearly call for this Court to recognize the intent of Congress and the evolving intent of the Supreme Court that appeals from the District Court exercising its admiralty jurisdiction should be treated the same as appeals from the same courts exercising their "at law" jurisdiction.

Appealability Under 28 USC §1292 (b)

While it is the firm position of plaintiffs that this matter is appealable under 28 USC & 1292 (a) (1), the Fifth Circuit retained the power to consider this Appeal under §1292(b) of Title 28 of the United States Code. As noted in Volume IX of Moore's Federal Practice (1980), p. 263:

> ". . . if an order is arguable reviewable by virtue of some other provision, and the question presented is of a kind that would be certifiable under §1292 (b), the Court of Appeals can, if it finds the order in fact to be non-appealable, proceed to determine the question on the assumption that the district court would or should have certified it."

A review of the foregoing brief summary of the merits of the issues presented on this appeal clearly indicates that the questions raised by this appeal involve controlling questions of law as to which there are substantial grounds for a difference of opinion and that an immediate appeal from the order will materially advance the ultimate termination of the litigation. The Fifth Circuit should have considered this appeal under 28 USC §1292(b).

Review Pursuant to 28 USC §1651

An alternative method by which the Fifth Circuit could have reviewed the decision of the District Court was to have considered the appeal in this case as a request for a writ of mandamus. The appellate court may issue such a writ of mandamus when the decision of the District Court constituted such an abuse of discretion as occurred in the instant case. Such abuse of discretion by the lower court, coupled with the extreme hardship imposed upon plaintiffs by the decision in question, clearly mandated that the Fifth Circuit should have directed the District Court to reconsider its decision in light of directives and guidlines from the appellate court. As noted in Volume IX of Moore's Federal Practice (1980), p. 248:

> "Orders granting or refusing stays in response to §3 motions are reviewable by mandamus in an appropriate situation."

See also Standard Chlorine of Delaware vs. Leonard, 384 F.2d 304 (2nd Cir. 1967). Plaintiffs respectfully submit that the instant case is indeed an appropriate situation in light of the obvious error in the lower court's decision and the extreme burden of the result of that decision and submit that the Fifth Circuit erred in not considering the appeal pursuant to the authority of 28 USC §1651.

SUMMARY

In summary, plaintiffs respectfully submit that the clear language of §1292 (a) (1) allows an appeal from the order in question. The only historical limitation on the scope of that statute was a judicially created limitation, the authority of which has been continually eroded by subsequent United States Supreme Court decisions and Congressional action. The order staying an action pending arbitration in an admiralty case is every bit as much an injunction as the same order in an action based upon diversity of federal question jurisdiction. There are no constitutional, statutory or policy reasons to continue an illogical distinction. On the contrary, consitutional, statutory and policy reasons dictate uniformity in this area.

As an alternative avenue of review, the Fifth Circuit should have considered the order in question pursuant to its authority under 28 USC §1292 (b) and/or its authority under 28 USC §1651.

For the foregoing reasons, petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Appendix

APPENDIX A

ANDREW MARTIN MARINE CORPORATION,
ANDREW MARTIN INTERNATIONAL, N.W.,
Plaintiff-Appellants,

versus

MOTOREN-WERKE MANNHEIM, A. G., et al,
Defendants-Appellees

United States Court of Appeals
for the Fifth Circuit

Civil No. 79-3617

Appeal from the United States District Court
for the Eastern District of Louisiana

Before AINSWORTH, REAVLEY, and RANDALL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion to dismiss appeal is granted.

APPENDIX B

ANDREW MARTIN MARINE CORPORATION,
Plaintiff,

versus

MOTOREN-WERKE MANNHEIM, A. G., et al,
Defendants.

United States District Court
Eastern District of Louisiana

June 5, 1979

Civil No. 78-3057

ORDER

This matter is before this Court on defendants' motion to stay pending arbitration. After considering the pleadings, evidence and argument of counsel,

IT IS ORDERED that the motion to stay pending arbitration filed on behalf of the defendants, Motoren-Werke Mannheim, A. G. and Oosterhuis Industries, Inc. be GRANTED and this matter is hereby STAYED.

LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

APPENDIX B

ANDREW MARTIN MARINE CORPORATION,
Plaintiff,

versus

MOTOREN-WERKE MANNHEIM, A. G., et al,
Defendants.

United States District Court
Eastern District of Louisiana

June 7, 1979

Civil No. 78-3057

REASONS FOR RULING

The plaintiffs opposed this motion on essentially two bases, one of which was that the plaintiffs herein were not party to the agreement containing the arbitration clause. This is a motion brought pursuant to 9 USC 3. This Court believes that the Court in *Tepper Realty Company vs. Mosaic Tile Company*, 259 F. Supp. 688 (S. D. N. Y. 1966) was correct in holding that the question of whether a party is bound to arbitrate is not a question to be resolved in a §3 motion.

The second basis of plaintiffs' opposition is that the claim before this Court is a tort claim and does not fall within the ambit of the subject arbitration clause, wherein the parties agreed to arbitrate disputes arising out of the contract. In support of their position plaintiffs cite the case of *Jig the Third Corp. vs. Puritan Mar. Ins. Under Corp.*, 519 F. 2d 171 (CA5-1975) wherein the Court recognized a maritime tort action similar to the one at bar and further held that a waiver of the right to sue in tort would not be enforced by a Court

unless it specifically mentioned tort or negligence. The instant clause does not comply. However, this Court distinguishes this case from *Jig the Third. Jig the Third* dealt with the waiver of a *right* to sue in tort. Herein this Court is not faced with the waiver of the right to sue in tort, but merely an agreement that should a claim arise out of the contract it should be settled by arbitration. There is no loss of a right to recover, only a designation of the forum where recovery can be had. Therefore the requirement that tort or negligence be specifically enumerated is not applicable herein. In fact, in deciding questions of arbitrability, the federal policy is to construe liberally arbitration clauses, to find that they cover disputes reasonably contemplated by the language and to resolve doubts in favor of arbitration. *Coenen vs. R. W. Pressprich & Co.*, 453 F.2d 1209 (CA2-1972), *cert. denied*, 406 US 949, 92 S. Ct. 2045 (1972). *Texas Gas Transmission Corp. vs. International Chemical Workers*, 200 F. Supp. 521 (W. D. La. 1962).

This Court is also persuaded that this matter should be submitted to arbitration by the policy arguments concerning international arbitration agreements enunciated by the Supreme Court in *Scherk vs. Alberto-Culver Company*, 417 US 506, 94 S. Ct. 2449 (1974). Therein, at p. 2456, the Court stated:

> "A parochial refusal by the Courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining

> Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might untimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."

For the foregoing reasons defendants' motion has been granted.

New Orleans, Louisiana, this 5th day of May, 1979.

LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

APPENDIX C

ANDREW MARTIN MARINE CORPORATION,
Plaintiff,

versus

MOTOREN-WERKE MANNHEIM, A. G., et al,
Defendants.

United States District Court
Eastern District of Louisiana

October 2, 1979

Civil No. 78-3057

ORDER

This matter is before the Court on plaintiffs' motion to reconsider this Court's order staying this action pending arbitration. After considering the pleadings and arguments of counsel, accordingly:

IT IS ORDERED that plaintiffs' motion to reconsider this Court's order of June 5, 1979 be DENIED.1/

LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

1/ This matter has been exhaustively briefed. However, after review of all arguments presented by plaintiffs, This Court adheres firmly to its original opinion for the reasons previously stated.

Opposition

Office - Supreme Court, U.S.
FILED
APR 29 1982
ALEXA

No. 81-1508

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ANDREW MARTIN MARINE CORPORATION, *ET AL.*,
Petitioners,

v.

MOTOREN-WERKE MANNHEIM, A.G., *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ANDREW MARTIN MARINE CORPORATION, *ET AL.*,

Petitioners,

v.

MOTOREN-WERKE MANNHEIM, A.G., *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Motoren-Werke Mannheim, A.G., and Oosterhuis Industries, Inc.,[1] respectfully request that this Court deny the Petition for a writ of certiorari, seeking

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[1] Pursuant to Rule 28.1, the corporate respondents to this proceeding, including all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation are: Respondent Motoren-Werke Mannheim, A.G., Diaz de Teran, S.A., MWM-Murphy Diesel Company, Mannheim Diesel A/S, MWM-Diesel France S.A.R.L., MWM-Iran, MWM-Diesel Far East Pte. Ltd., and MWM Motores Diesel Ltda.; and Respondent Oosterhuis Industries, Inc., and Marine Engineering, Inc.

review of the Court of Appeals' order dismissing Petitioners' appeal.

REASONS FOR DENYING THE WRIT

I.

THE RESULT BELOW DOES NOT DEPEND ON WHETHER ADMIRALTY COURTS HAVE EQUITABLE POWERS.

Petitioners contend that the dismissal of their appeal below was the result of an anachronism, *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454 (1935). They argue that because an order staying litigation pending arbitration[2] is appealable when issued in a civil case, it should also be appealable when issued in an admiralty case. But under this Court's most recent construction of 28 U.S.C. § 1292(a)(1), the stay order would not be appealable even if issued in a civil case. Thus there is little reason to use this case to re-examine *Schoenamsgruber*, which holds such orders unappealable in admiralty, and even less reason to use it as a vehicle for re-evaluating the equity powers of admiralty courts.

The appealability of stay orders under the interlocutory appeal statute (§ 1292(a)(1) and its predecessors) was first considered in *Enelow v. New York Life Insurance Company*, 293 U.S. 379 (1935). There, the Court held appealable a district court order directing that a

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[2] The arbitration clause Respondents relied on in their motion for a stay in the District Court reads:

> Any dispute arising out of the Contract shall be finally settled, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by one or more arbitrators designated in conformity with those Rules.

bench trial of an equitable defense precede a jury trial of the legal claim. Since law and equity were not then merged, the Court likened the order to an exercise of "the power [of one court] to stay proceedings in another court." 293 U.S. at 382. After law and equity were merged by the Federal Rules of Civil Procedure in 1938, the Court adhered to the *Enelow* rule in *Ettelson v. Metropolitan Life Insurance Company*, 317 U.S. 188 (1942), despite the contention that the merger undermined the *Enelow* rationale. But where the original claim was equitable, an order denying a jury trial for a legal counterclaim was held not appealable. *City of Morgantown v. Royal Insurance Company*, 337 U.S. 254 (1949). The order was merely "a ruling as to the manner in which [the trial judge] will try one issue in a civil action pending before himself." *Id.* at 257.

This Court has considered two civil cases where the orders directed not that trial of equitable issues precede trial of legal issues, but that the case be stayed pending arbitration. In *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 (1935), the Court held that an order granting or denying a stay of a legal action pending arbitration was an injunctive order appealable under the interlocutory appeal statute, just like the order in *Enelow*, decided the same day. But in *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176 (1955), the Court held that the denial of a stay of an equitable action pending arbitration is not appealable; it deemed the result controlled by *Morgantown* rather than *Enelow* and *Ettelson*.[3]

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[3] Dissenting in *Morgantown*, Justice Black stated that its effect was to overrule *Enelow* and *Ettelson*. 337 U.S. at 261-62. But Justice Black's concern was the preservation of the Seventh

[footnote continued]

Thus, in a civil setting, the appealability of an order staying litigation pending arbitration depends on whether the stayed claim is legal or equitable, not whether the staying court has equitable powers.[4] It would be anachronistic, indeed, for the Court to entertain at this late date the question, implicitly posed by the Petition, whether an admiralty court has an equity as well as an admiralty side.

Different results in legal and equitable actions have been subject to at least as much judicial and academic criticism as Petitioners ascribe to *Schoenamsgruber. See Brandon v. Hines,* 439 A.2d 496, 505 (D.C. App. 1981), and authorities cited. This Court has itself found it incongruous for appealability to depend on the nature of the stayed action. *Baltimore Contractors, supra,* at 184. But under this Court's most recent application of § 1292(a)(1), *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), the district court's stay in the instant case is not appealable and would not be appealable even if Petitioners had invoked diversity jurisdiction.

Carson held appealable under § 1292(a)(1) a district court's refusal to enter a consent order negotiated by the parties in settlement of a class action alleging discrimi-

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Amendment right to a jury trial, *id.* at 262, and that same concern, though unexpressed, appears to underlie *Enelow* and *Ettelson* as well. The later decisions in Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), guaranteed the right to a jury trial of legal issues prior to a bench trial of equitable issues. Since those decisions, there has been no need for the jury-preservation function of *Enelow* and *Ettelson.*

[4] Petitioners affirmatively chose to bring their suit in admiralty rather than at law, see Fed. R. Civ. P. 9(h), so this case provides no occasion for reconsidering the *Enelow-Ettelson* rule.

nation in employment. The proposed consent order contained elaborate injunctive provisions, and the Court readily found that the refusal to enter it was in practical effect the refusal of an injunction within the meaning of § 1292(a)(1). 450 U.S. at 83.

But the Court held that injunctive effect alone was insufficient to warrant an interlocutory appeal, 450 U.S. at 84, quoting from *Baltimore Contractors, supra*:

> Unless a litigant can show that an interlocutory order of the District Court might have "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.

In *Brandon v. Hines, supra,* the District of Columbia Court of Appeals applied the *Carson* analysis to the question of appealability of orders granting or denying stays pending arbitration. Orders granting stays threaten no serious consequence because arbitration awards are not self-executing (9 U.S.C. § 9), and thus a stay order may be effectually challenged in a subsequent enforcement action. Orders refusing stays, however, are immediately appealable because they deprive the parties of an agreed dispute-resolving procedure, just as the refusal to enter the consent order in *Carson* deprived the parties of the opportunity to settle their case on negotiated terms. 439 A.2d at 507.

In the instant case, Petitioners point to no serious consequence and no loss of opportunity for effectually challenging the stay order.[5] The only grounds on which

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[5] In support of an argument of reviewability under the All Writs Act, 28 U.S.C. § 1651, the Petition (at 12) cites "the extreme hardship imposed upon plaintiffs by the decision in question," but neither identifies nor explains the nature of such hardship.

Petitioners opposed the stay in the trial court—that they are not parties to the arbitration agreement and that the agreement does not cover their tort claim (Petition at 4, A-3)—are both matters they may raise in an action to enforce any adverse arbitration award. 9 U.S.C. §§ 10, 11.

That admiralty courts have equitable powers is already established, as shown in *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962), cited by Petitioners. In the instant case, the court of appeals reached the right result in dismissing the appeal from the stay pending arbitration. Since the court issued no opinion, it is far from manifest that the much-maligned *Schoenamsgruber* was even the basis for its decision. Moreover, as a practical matter the result furthers the enlightened policy favoring international commercial arbitration, as enuncitaed in *Scherk v. Alberto-Culver Company*, 417 U.S. 506 (1974). This case is an unsuitable candidate for Supreme Court review.

II.

PETITIONERS' ARGUMENTS UNDER 28 U.S.C. §§ 1291(b) AND 1651 FURNISH NO REASON FOR SUPREME COURT REVIEW.

The Petition (at 11-12) urges that the stay order is appealable under the certification procedure of 28 U.S.C. § 1292(b) or under the All Writs Act, 28 U.S.C. § 1651. As to the first, Petitioners never sought certification by the district court; as to the second, Petitioners made no application to the court of appeals for a writ. As to both, Petitioners identify no abuse of discretion or other extraordinary circumstance warranting appellate review of the stay order.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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April 29, 1982